

Dear Registrar,

I respectfully provide this correspondence not to seek any interlocutory determination of the matters raised below, but to ensure there is an accurate record of the conduct that occurred during the Case Conference for the assistance of the Tribunal at the hearing.

I am writing to place on the Tribunal record my serious concerns regarding the **conduct of the Respondent's Agency Representative** during the **Case Conference** held on [REDACTED].

Before outlining those concerns, I wish to express my sincere gratitude to both the ART Facilitator and the Respondent's external legal representative. Both conducted themselves with professionalism, courtesy and compassion throughout what became a challenging conference, and I am grateful for their efforts to de-escalate the discussion and keep the conference productive.

My concerns relate solely to the conduct, statements and apparent lack of preparation demonstrated by the NDIA's Agency Representative during the conference. I respectfully request that the matters outlined below be placed on the Tribunal record ahead of the hearing.

1. Substituting Personal Preference for Statutory Requirements

During the conference, the NDIA Agency Representative explicitly stated to me: *"You're not going to make me change my mind about what I think is the best possible evidence before the Tribunal, based on my experience."* This statement demonstrates a rigid, inflexible reliance on personal preference rather than an objective assessment of the evidence. As a Commonwealth decision-maker, the representative is legally obligated to assess the evidence against the criteria in the *NDIS Act*, not against her personal "experience" of what she subjectively prefers. This statement gave me the clear impression that the representative had predetermined what evidence she would accept before considering the evidence specific to my case. That is difficult to reconcile with an objective merits review, where evidence should be assessed on its own merits rather than against a predetermined preference.

2. Disregard for the NDIS Act and Rules

This reliance on personal preference was further compounded when I asked the Agency Representative to identify the legislative basis for her position that an Occupational Therapist must complete a Functional Capacity Assessment. The representative replied, *"The Act is old."* No legislative provision, NDIS Rule, Operational Guideline or policy was identified in support of that position.

Throughout these proceedings, I have repeatedly asked the Respondent to identify the legislative provision, NDIS Rule, Operational Guideline or policy requiring an Occupational Therapist, rather than another appropriately qualified treating clinician, to complete a Functional Capacity Assessment. Despite multiple opportunities, no such authority has been identified. In those circumstances, I remain concerned that the Respondent's position is based on personal preference rather than an identified statutory or policy requirement.

3. Rejection of NDIA Policy

The Agency Representative further justified her refusal to accept my Functional Capacity Assessment by stating that the WHODAS 2.0 is not her preferred tool. I reminded the representative that the WHODAS 2.0 is explicitly published on the NDIA's own website as the Agency's preferred functional assessment tool for adults with a disability in the 'other' category. Dismissing highly relevant, valid clinical evidence because it does not align with a representative's personal rule of thumb - while simultaneously contradicting the Agency's own published guidelines - raises concerns regarding the consistency and fairness of the Respondent's assessment of the evidence.

4. Procedural Unfairness and Shifting Positions

To prepare for a hearing, I must understand the case I am required to answer. During the conference, I sought clarification regarding the Respondent's position. While the Updated Statement of Issues dated 20 July states that the Respondent relies on the March Internal Review Decision, the Agency Representative stated during the conference

that the Respondent was instead relying on the Statement of Issues dated 5 June. Those documents contain materially different reasoning.

As a result, I remain uncertain as to the Respondent's actual case and the basis upon which the Respondent intends to defend the reviewable decision. This uncertainty has significantly affected my ability to prepare for the hearing.

5. Failure to Review the Evidentiary Record

The representative continued to assert that Dr. _____ is my diagnosing specialist, and when corrected, asked, "*who is the diagnosing specialist?*" The fact that Dr. _____ diagnosed my condition is clearly documented in the evidence and has already been accepted by the Agency. The representative's lack of familiarity with basic, foundational facts of my medical file raises significant concern that the Respondent's ongoing requests for additional evidence may stem from an incomplete understanding of the existing evidentiary record rather than from an identified evidentiary gap.

6. Misunderstanding of Clinical Contraindications

The representative attempted to dismiss my Functional Capacity Assessment by claiming it did not adequately separate "observed" capacity from "reported" capacity. The representative failed to comprehend that my physical restrictions - such as turning my neck while driving or reaching overhead to perform routine tasks - are not matters of physical inability, but of strict medical contraindication to prevent cervical subluxation and circulation restriction. My treating physiotherapist understands this vital clinical distinction; the Agency Representative appeared not to appreciate the distinction between physical incapacity and medically contraindicated activity.

Conclusion

The conduct described above appears inconsistent with the Commonwealth's obligation to conduct litigation fairly and to assist the Tribunal in reaching the correct or preferable decision. While I appreciate that the Tribunal is not required to determine compliance with the Commonwealth's Model Litigant Obligations, I respectfully request that the conduct outlined above be placed on the Tribunal record.

I again extend my sincere thanks to the Tribunal Facilitator and the Respondent's external legal representative for their professionalism, courtesy, and efforts to keep the conference productive.

Given the concerns outlined above, I respectfully request that this correspondence be placed on my file ahead of the hearing. I ask that the presiding Tribunal Member consider this documented record of the Respondent's conduct, the inconsistencies in the Respondent's stated position, and the Agency Representative's inability to identify any legislative basis for key evidentiary requirements when assessing the weight and reliability of the Respondent's submissions at the hearing.

Kind regards,
Emma [REDACTED]

This correspondence has been prepared from contemporaneous notes taken during the Case Conference. All participants were advised at the commencement of the conference that my advocate would be taking detailed minutes.